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EXAMINER	
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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/824,376
Filing Date: April 15, 2004
Appellant(s): HANSEN ET AL.

Robert Barrett
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed December 13, 2007 appealing from the Office action mailed September 18, 2007.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

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(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Application Serial No. 10/819,180 is an Examiner's Answer, mailed November 26, 2007, that is related to the present application and is before the Board of Appeals.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

UK 2,033,721	Ripper	5-1980
3,769,030	Kleinert	10-1973
4,343,818	Eggen	8-1982
5,676,993	Watterson et al	10-1977
5,888,562	Hansen et al	3-1999

2,835,590	Rusoff	5-1958

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-5 and 11-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ripper in view of Rusoff (2,835,890) for reasons of record.

Ripper discloses the manufacture of chocolate liquor by treating the chocolate with a reduced pressure to remove the undesirable flavors of the product. Then the chocolate is combined with sugar, cocoa butter, 1% flavoring and lecithin to prepare a chocolate product for molding. At page 2, first full paragraph of Appellants' specification, sweet is described as a flavor attribute. Given the extent of sugar in Ripper, it would have been

obvious to expect the chocolate of Ripper to have a sweet flavor attribute because sugar is known to provide sweetness to foods. At page 2, lines 85-86, 0-1.5% lecithin and flavoring is contemplated. The claims appear to differ from Ripper in the recitation of the selection of certain non-cocoa/dairy flavor attributes for the chocolate of Ripper. Rusoff (2,835,590) teaches that combinations of peptides containing glycine or alanine with saccharide materials act to create chocolate flavor. At column 3, line 62 rhamnose is included as a suggested saccharide. At column 2, line 65 proline is included as a flavor enhancing agent. The concept of preparing the flavor ingredient in a fat-based medium is indirectly suggested because anhydrous conditions are required for the reaction at column 3, line 51-52. Thus it would have been obvious to one of ordinary skill in the art to utilize the flavor or Rusoff in the chocolate product of Ripper in order to enhance the chocolate impact of the product. It is appreciated that the specific flavors of claims 2 and 15 are not indicated but these flavor notes are well known descriptors of chocolate. It is also appreciated that "house flavor" and "asset utilization" and "cost reduction" and "recipe flexibility" are not mentioned but these features would be obvious variants of the basic Rusoff teachings. The specificity of these features would vary with the whims of

the market and taste of the consumer and are not seen to add patentable weight to the claims.

Claims 1- 4, 6 & 10-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ripper in view of Kleinert (3,769,030) or Watterson (5,676,993).

Ripper discloses the manufacture of chocolate liquor by treating the chocolate with a reduced pressure to remove the undesirable flavors of the product. Then the chocolate is combined with sugar, cocoa butter, 1% flavoring and lecithin to prepare a chocolate product for molding. At page 2, first full paragraph of Appellants' specification, sweet is described as a flavor attribute. Given the extent of sugar in Ripper, it would have been obvious to expect the chocolate of Ripper to have a sweet flavor attribute because sugar is known to provide sweetness to foods. At page 2, lines 85-86, 0-1.5% lecithin and flavoring is contemplated. The claims appear to differ from Ripper in the suggestion of adding certain non-cocoa/dairy flavor attributes that contain specific ingredients. Kleinert teaches the fabrication of flavors for use in chocolate by the development of the Maillard reaction products (column 3, lines 48-59 & example 1. Although roasting is not specifically suggested in the reference, no unobvious or unexpected

difference is seen between the heat treatment Kleinert and roasting. It would have been obvious to one of ordinary skill in the art to utilize the flavor of Kleinert in the chocolate of Ripper in order to enhance the maillard color/flavor of Ripper by using the fabricated flavors of Kleinert.

Similarly Watterson teaches that the Maillard reaction products of sugar and amino acids provide a way of enhancing the flavor of a fat matrix (see abstract). It would have been obvious to one of ordinary skill in the art to utilize the flavor of Watterson in the chocolate of Ripper in order to enhance the maillard flavor of Ripper by using the fabricated flavors of Watterson.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ripper in view of Rusoff as applied to claims 1-5 and 11-20 above, and further in view of Eggen (4,343,818).

Ripper discloses the manufacture of chocolate liquor by treating the chocolate with a reduced pressure to remove the undesirable flavors of the product. Then the chocolate is combined with sugar, cocoa butter, flavoring and lecithin to prepare a chocolate product for molding. At page 2, first full paragraph of Appellants' specification, sweet is described as a flavor attribute. At page 2, lines 85-86, 0-1.5% lecithin and flavoring is

contemplated. The claims appear to differ from Ripper in the recitation of the selection of certain non-cocoa/dairy flavor attributes for the chocolate of Ripper. Rusoff (2,835,590) teaches that combinations of peptides containing glycine or alanine with saccharide materials act to create chocolate flavor. Claim 7 appears to differ from Ripper in view of Rusoff in the suggestion of adding flavor precursors that are enzyme hydrolysates of cocoa polysaccharides. Eggen teaches the application of amylase to cocoa to hydrolyze the cocoa ingredients. One of ordinary skill in the art would expect this enzymatic process to sweeten the cocoa and provide for more Maillard precursor ingredients. It would have been obvious to one of ordinary skill in the art to use the hydrolysis ingredients of Eggen in the chocolate of Ripper to sweeten the chocolate product.

Claims 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ripper in view of Rusoff as applied to claims 1-5 and 11-20 above, and further in view of Hansen (5,888,562).

Ripper discloses the manufacture of chocolate liquor by treating the chocolate with a reduced pressure to remove the undesirable flavors of the product. Then the chocolate is combined with sugar, cocoa butter, flavoring and lecithin to prepare a chocolate product for molding. . At page

2, first full paragraph of Appellants' specification, sweet is described as a flavor attribute. At page 2, lines 85-86, 0-1.5% lecithin and flavoring is contemplated. The claims appear to differ from Ripper in the recitation of the selection of certain non-cocoa/dairy flavor attributes for the chocolate of Ripper. Rusoff (2,835,590) teaches that combinations of peptides containing glycine or alanine with saccharide materials act to create chocolate flavor. Claims 8 and 9 appear to differ from Ripper in view of Rusoff in the suggestion of adding flavor precursors that are the result of protease treatment or is a crumb flavor. Hansen teaches treating coco nibs with an acid at pH 4 and then adding in carboxypeptidase as a protease treatment. Then the nibs were roasted and processed as usual (examples 3 & 4). It would have been obvious to one of ordinary skill in the art to treat the chocolate of Ripper by the process of Hansen in order to enhance the flavor precursors in chocolate. It is appreciated that malty or crumb flavor is not mentioned but the same acts in the same relation would have been expected to achieve the same results.

(10) Response to Argument

Claims 1-5 and 11-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ripper in view of Rusoff.

Appellant argues that Ripper uses non-conventional methods of making chocolate. This is disagreed with. Ripper's chocolate was patented before applicants' claimed invention and is considered to be conventional. Appellant urges that he has defined these conventional methods in the specification at page 1, lines 17-26 but the specification does not specifically define "conventional methods". It merely provides a couple of alternative choices for traditional chocolate manufacture. Appellant urges that Ripper teaches that his process is non-traditional at page 1, lines 7-10 and 40-50. But Ripper was patented in 1980. If it is not traditional by 2001, it is certainly conventional.

Appellant argues that one of ordinary skill in the art would not look to Rusoff to modify the flavor attributes in Ripper because Rusoff is directed to an artificial chocolate. But chocolate and milk flavors are valuable natural resources that are often expensive. When faced with a shortage of natural chocolate and dairy flavors, it would have been obvious to look to artificial chocolate and dairy flavors. If one of ordinary skill in the art wanted to boost the flavor of chocolate without expending valuable chocolate resources, it would be obvious to look to the flavoring provided

by Rusoff. The flavorings of Rusoff provide a source of non-cocoa/dairy flavors for chocolate.

Appellant argues that non-cocoa/dairy flavors are not suggested in Ripper. But chocolate is well known in the art to be flavored with non-cocoa/dairy flavors. Vanilla and fruit flavors a known in the art to be used in chocolate formulations. There is no suggestion in Ripper that the ordinary artisan is prevented from modifying the flavor of chocolate with alternative ingredients.

Claims 1-4, 6 and 10-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ripper in view of Kleinert (3,769,030) or Watterson (5,676,993) for reasons of record.

Appellant argues that Ripper uses non-conventional methods of making chocolate. This is disagreed with. Ripper's chocolate was patented before applicants' claimed invention and is considered to be conventional. Appellant urges that he has defined these conventional methods in the specification at page 1, lines 17-26 but the specification does not specifically define "conventional methods". It merely provides a couple of alternative choices for traditional chocolate manufacture. Appellant urges that Ripper teaches that his process is non-traditional at

page 1, lines 7-10 and 40-50. But Ripper was patented in 1980. If it is not traditional by 2001, it is certainly conventional.

Appellant argues that Kleinert adds milk flavors to chocolate but Kleinert, at column 3, lines 53 to column 4, line 5, provides options for a variety of flavors that include non-cocoa and non-dairy flavors. Milk and cocoa are not the starting ingredients for these flavors. Similarly Watterson uses non-cocoa and non-dairy ingredients to enhance the cocoa flavor of chocolate but the flavors form are described at column 14, lines 33-35 as having non-cocoa attributes.

Appellant argues that non-cocoa/dairy flavors are not suggested in Ripper. But chocolate is well known in the art to be flavored with non-cocoa/dairy flavors. Vanilla and fruit flavors a known in the art to be used in chocolate formulations. There is no suggestion in Ripper that the ordinary artisan is prevented from modifying the flavor of chocolate with alternative ingredients.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ripper in view of Rusoff as applied to claims 1-5 and 11-20 above, and further in view of Eggen (4,343,818) for reasons of record.

Appellants' arguments are directed to the rejection of Ripper in view of Rusoff. Appellant urges that the reaction of the enzyme on a cocoa polysaccharide could not provide for a non-cocoa flavor attribute. This has been considered but is not persuasive. Sweetness is described as a non-cocoa flavor on page 2, first full paragraph.

Claims 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ripper in view of Rusoff as applied to claims 1-5 and 11-20 above, and further in view of Hansen (5,888,562) for reasons of record.

Appellants' arguments are directed to the rejection of Ripper in view of Rusoff.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Carolyn Paden

CAROLYN PADEN 1794
PRIMARY EXAMINER
Carolyn Paden

Conferees:

Milton Cano

Romulo Delmendo
Appeal Conferee